81-2306

NO._____

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IN THE

Supreme Court of the United States

October Term, 1981

LOCAL 66, BOSTON TEACHERS UNION,
AFT, AFL-CIO,
Petitioner,
v.
BOSTON SCHOOL COMMITTEE, et al.,
Respondents.

APPENDIX TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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APPENDIX

Tallulah MORGAN, et al., Plaintiffs, Appellees, v. John D. O'BRYANT, et al., Defendants, Appellees, Local 66, Boston Teachers Union, AFT, AFL-CIO, Intervenor, Appellant.

Tallulah MORGAN, et al., Plaintiffs, Apellees, v. John D. O'BRYANT, et al., Defendants, Appellees, Boston Association of School Administrators and Supervisors, Intervenor, Appellant.

Tallulah MORGAN, et al., Plaintiffs, Appellees, v. John D. O'BRYANT, et al., Defendants, Appellees, Concerned Black Educators of Boston, Intervenor, Appellant.

(Nos. 81-1561, 81-1617 to 81-1619 and 81-1646.)

ORDER

(United States Court of Appeals, First Circuit.)

Argued Jan. 6, 1982.

Decided Feb. 17, 1982.

Bruce A. Miller, Detroit, Mich., with whom Christopher P. Legghio, Stuart M. Israel, Miller, Cohen, Martens & Sugarman, P.C., Detroit, Mich., James T. Grady and Grady & McDonald, Boston, Mass., were on brief, for Local 66, Boston Teachers Union, AFT, AFL-CIO.

Paul F. Kelly, Boston, Mass., with whom Richard W. Coleman, and Segal, Roitman & Coleman, Boston, Mass., were on brief, for Boston Ass'n of School Adm'rs and Sup'rs, AFL-CIO.

Caroline B. Playter, Boston, Mass., with whom Doyle, Playter, Novick & Berkin, Boston, Mass., and Kenneth Kimerling, New York City, were on brief, for El Comite De Padres.

Larry J. Johnson, with whom Robert Pressman, Cambridge, was on brief, for Tallulah Morgan, et al.

Marshall Simonds, Boston, Mass., with whom Henry C. Dinger, and Goodwin, Proctor & Hoar, Boston, Mass., were on brief, for Boston School Committee.

Robert H. Blumenthal, Boston, Mass., Counsel, Dept. of Ed.,, with whom Robert H. Bohn, Jr., Sp. Asst. Atty. Gen., Boston, Mass., was on brief, for Bd. and Com'r of Ed.

John C. Somers, New York City, on brief for The A. Philip Randolph Institute, amicus curiae.

Nancy Gertner, Charles W. Rankin, and Silverglate & Gertner, Boston, Mass., on brief for Concerned Black Educators of Boston.

Before: COFFIN, Chief Judge, CAMPBELL and BOWNES, Circuit Judges.

LEVIN H. CAMPBELL, Circuit Judge.

These consolidated appeals are from orders of the district court in the Boston school desegregation case. A short history may prove helpful. In 1974, the district court found that Boston public school authorities had knowingly engaged in a policy of racial discrimination and intentionally maintained a dual school system along racially segregated lines. *Morgan v. Hennigan*, 379 F.Supp. 410 (D. Mass. 1974). This court affirmed. Morgan v. Kerrigan, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963, 95 S.Ct. 1950, 44 L.Ed.2d 449 (1975). The basic

remedial orders were entered in 1975 and affirmed in 1976. *Morgan v. Kerrigan*, 401 F.Supp. 216 (D.Mass. 1975), *aff'd* 530 F.2d 401 (1st Cir.), *cert. denied*, 426 U.S. 935, 96 S.Ct. 2648, 49 L.Ed.2d 386 (1976). In addition to holding that pupil assignment and other actions were discriminatory, the district court found that defendants discriminated in the area of faculty and staff hiring[1] and assignment. 379 F.Supp. at 456-66. Accordingly, the court ordered that black and white teachers be hired on a one-for-one basis until the percentage of black faculty reached 20 percent (the approximate percentage of blacks in Boston at that time),[2] with affirmative recruitment to continue until a figure of 25 percent black faculty was reached, *Morgan v. Kerrigan*, 388 F.Supp. 581 (D.Mass. 1975), and this court affirmed, 530 F.2d 431 (1st Cir.) *cert. denied*, 426 U.S. 935, 96 S.Ct. 2648, 49 L.Ed.2d 386 (1976). An order to the same effect with respect to administrators was entered on February 24, 1976; this order was neither published nor appealed. In 1978, the district court found that the defendants had not complied with its faculty recruitment and hiring orders, and therefore modified those orders to require that the percentage of black teachers increase annually by at least one and one-half percentage points until the 20 percent goal was attained. This unpublished order was entered July 5, 1978 and was not appealed.

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[1] In 1972-73, 5.4 percent of the permanent teachers were black; in 1970-71, 3.5 percent of the administrators were black. 379 F.Supp. at 463.

[2] The percentage of black students in the Boston public schools at that time was approximately 35 percent. *Morgan v. Kerrigan*, 388 F.Supp. at 582. Preliminary 1980 census figures show an overall black population in Boston of over 22 percent; the projected percentage of black children in the Boston public schools for 1981 was over 46 percent.

By early 1981, the percentage of black teachers was 19.09 percent and that of black administrators 20.53 percent. This progress was threatened, however, by a budget crisis precipitated by decreased funding. In order to comply with its reduced budget, the Boston School Committee considered massive layoffs of teachers and administrators. It was faced, however, with conflicting obligations: on the one hand, its collective bargaining agreements called for layoffs by reverse seniority; on the other, such a procedure would drastically reduce the percentage of black teachers and administrators (most of whom had been hired in the last few years and thus had little seniority), in violation of the district court's desegregation orders. The School Committee decided that if layoffs of teachers proved to be necessary, they should be conducted so as to maintain the current percentage of black teachers, but layoffs of administrators, if necessary, should be conducted by reverse seniority. It filed motions with the district court for approval of these decisions. On June 2, 1981, the district court granted the motion — with minor modifications — with respect to the teachers.[3] On July 9, 1981, it denied the motion with respect to the administrators and ordered that the percentage of black administrators be maintained even in the face of layoffs.

The court's orders were conditional. That is, they did not themselves mandate any layoffs. Rather, they simply specified the principles determining who should be laid off if, for reason of economics or otherwise, layoffs

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[3] The order also specifies that laid-off black teachers will have an absolute preference in recall until the 20 percent goal is reached. The order suspends the defendants' obligation to engage in affirmative recruitment aimed at reaching a goal of 25 percent black faculty, until all tenured teachers who are laid off have been recalled.

were in fact made. Layoffs have since taken place in accordance with the priorities established in the court orders, thus maintaining the existing percentages of black faculty and administrators at close to 20 percent. The Boston Teachers Union ("BTU") asserts that between 700 and 1,100 teachers have been laid off. If the seniority approach had been followed, this would have reduced the percentage of black teachers to somewhere around 8 percent. Our information on the administrators from the Boston Association of School Administrators and Supervisors ("BASAS") is more precise: 15 headmasters and principals with permanent appointments were laid off. If seniority had been followed, 13.8 percent of those remaining would be black.

The appeals consolidated here for our review are as follows. In No. 81-1561, intervenor BTU appeals from the June 2 order and from the district court's denial of its request for reconsideration of that order on July 24, 1981. The plaintiff class, the School Committee, the State Board of Education, and intervenors El Comite de Padres Pro Defense de la Educacion Bilingue and Concerned Black Educators of Boston ("CBEB") have filed briefs as appellees; the A. Philip Randolph Institute has filed a brief as *amicus curiae* urging reversal. In No. 81-1617, intervenor BASAS appeals from the July 9 order. The appellees are the same as those in No. 81-1561, with the exception that the School Committee takes no position in this appeal. Finally, Nos. 81-1618, 81-1619, and 81-1646 are appeals brought by CBEB arguing that the orders do not go far enough in remedying past discrimination. No. 81-1618 is from the June 2 order; No. 81-1619 is from the denial of CBEB's motion to rescind that order; and No. 81-1646 is from the July 9 order.

The standards for equitable remedies in school desegregation cases have been set forth by the Supreme Court in *Milliken v. Bradley*, 433 U.S. 267, 280-81, 97 S.Ct. 2749, 2757, 53 L.Ed.2d 745 (1977). As discussed *infra*, we believe that the district court committed no abuse of discretion under *Milliken*, and we therefore affirm its orders. We note additionally, however, that the procedural posture of this case also argues for an affirmance. BTU asserted virtually none of the arguments it now presents on appeal to the district court during the argument conducted below concerning the faculty order entered June 2. At that argument, it chiefly spoke against the need for any layoffs and also against proposals to tailor the layoff procedure so as actually to increase beyond present ratios the percentage of black faculty. As far as we can glean from the record, it did not argue that the Boston School Committee's proposed formula for laying off teachers — the formula largely adopted by the district court — would involve unconstitutional discrimination, nor did it make any request for an evidentiary hearing, until its motion for reconsideration filed almost seven weeks after the original order. The district court must have broad discretion in deciding such motions for reconsideration, especially where no reasons are advanced for the movant's failure to present its arguments earlier. *Cf. Willens v. University of Massachusetts*, 570 F.2d 403, 406 (1st Cir. 1978) (discretion to grant relief from judgment). Similarly, BASAS did not argue that the district court's maintenance approach was unconstitutional at the July 9 hearing on the motion with respect to the administrators. Finally, CBEB had filed no motions until after the June 2 order was entered; the district judge understandably expressed considerable doubt as to his ability to grant the relief CBEB requested

in the absence of a prior motion. On appeal, the district court's exercise of its discretion is judged by the information and motions before it at the time it rendered its decision — not by hindsight. On this basis, it would be difficult — quite apart from our view of the substantive merits as discussed below — to overturn the lower court's handling of the various issues then before it.

The importance of this case, however, and its human impact naturally make us hesitant to decide on procedural and technical grounds. We thus turn to the merits of the controversy. The first *Milliken* requirement is that, "like other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation. The remedy must therefore be related to 'the *condition* alleged to offend the constitution. . . .' " *Milliken v. Bradley*, 433 U.S. at 280, 97 S.Ct. at 2757 (citations omitted; emphasis in original). It is plain that the present order, aimed at preserving a goal concerning the percentage of black teachers and administrators, is directly related to the unconstitutional conditions earlier found by the district court. This court has twice upheld the underlying district court orders concerning the percentage of black faculty as part of the desegregation remedy. *Morgan v. Kerrigan*, 509 F.2d 599 (1st Cir. 1975); 530 F.2d 431 (1st Cir. 1976). In 1975, we said that, having "found pervasive violations of the constitutional rights of black school children in the Boston schools," the district court had an "obligation . . . to rectify those violations," and we concluded that orders related to the percentage of black faculty "are directed toward the objective of eradicating the segregated system that has prevailed in the Boston schools, and [are] clearly within [the district court's] power in the context of this case." 509 F.2d at 600-01. We

further held in 1976 that the 20 percent goal was a valid part of the effort "to eliminate segregation and its effects 'root and branch,' " 530 F.2d at 432, *citing Green v. County School Board*, 391 U.S. 430, 438, 88 S.Ct. 1689, 1694, 20 L.Ed.2d 716 (1968). The 20 percent formula is thus clearly a part of the remedy earlier approved in this case to rectify the unconstitutional conditions found to exist. The purpose of the orders under review is to safeguard the progress toward desegregating the faculty and administrative staff — and thus the progress toward dismantling the dual school system — already made.

[1] Unlike BASAS, BTU never really argues otherwise. Rather, it asserts that desegregation has now been accomplished and that the district court's powers are therefore at an end. *See generally Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 96 S.Ct. 2697, 49 L.Ed.2d 599 (1976); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971). This argument has no basis in the present record, however. We find no indication that BTU ever moved in the district court that the court should withdraw, nor has it requested a hearing for the purpose of introducing evidence in support of such a motion.[4] Absent proceedings and proof showing that Boston's dual school

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[4] While BTU's motion for reconsideration included a request for an evidentiary hearing, *see infra* p. 29, that hearing was, as stated in the motion, "for the purpose of fully reviewing the impact on all the parties of the Court's June 2 order."

system has been abolished, the district court retained power to make orders premised on the unconstitutional conditions it found to exist.[5]

[2] We turn next to the second *Milliken* requirement: "the decree must indeed be *remedial* in nature, that is, it must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.' " *Milliken v. Bradley*, 433 U.S. at 280, 97 S.Ct. at 2757 (citation omitted; emphasis in original). Appellants BTU and BASAS contend that the orders do not satisfy this requirement because they benefit black teachers and administrators who were never shown to be the victims of hiring discrimination. They cite cases such as *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977) and *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), which they contend limit the award of retroactive seniority and like benefits to identifiable victims of hiring discrimination. The argument is that the district court's orders discriminate in employment and that they lack the proper factual predicate because no minority individuals have been identified as the victims of any discrimination.

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[5] The record before us amply supports a conclusion that the desegregation remedial goals have not been fully achieved. The 25 percent goal, which this court characterized as a "built-in terminus for court responsibility," *Morgan v. Kerrigan*, 530 F.2d at 434, is not even close to fulfillment. The 20 percent goal has been barely achieved with respect to the administrators and is close to achievement with respect to the teachers. This goal, however, was never intended to delimit the court's remedial powers, and, moreover, we noted that "time may indicate the goal to be too modest." *Id.* The plaintiff class has indicated below that it desires to increase the 20 percent figure to over 22 percent. The court stated that its rulings here under review were without prejudice to the proposals to increase the 20 percent goal.

A similar argument was made to this court when the 20 percent goal was first ordered, and we rejected it then, as we do now:

> This argument fundamentally misapprehends the nature of this case. The plaintiffs are not the black teachers or would-be teachers who have been discriminated against because of their race. The district court's examination of the School Committee's . . . policies was undertaken to determine whether those policies violated the rights of black Boston public school children. It is the rights of those children that the order in issue is intended to protect.

Morgan v. Kerrigan, 530 F.2d at 432. *See also Morgan v. Kerrigan*, 509 F.2d at 600 n.3. It has been recognized from the beginning that the victims here are the black school children, not the possible hiring discriminatees. *See Morgan v. Hennigan*, 379 F.Supp. at 456. The orders are thus designed, insofar as possible, to make the school children whole. Proof of individual hiring discrimination is irrelevant. The employment cases cited by appellants are inapposite as to this issue. *See Arthur v. Nyquist*, 520 F.Supp. 961, 966 (W.D.N.Y. 1981).

The plaintiff class has a right to an education in a school system free of racial discrimination in the employment of teachers and staff. *Morgan v. Hennigan*, 379 F.Supp. at 456, 463. The elimination of the vestiges of a segregated school system cannot be accomplished until the effects of past hiring discrimination have been eradicated. *See supra* p. 26. Such discrimination, if allowed to continue, may lead to difficulties in fully integrating the schools and in eliminating the maintenance of a dual school system. An integrated faculty and staff is also necessary to bring black students

and parents fully into the school community and decision-making processes and to counteract their past isolation. A racially balanced faculty also provides black students with role models, which may be "important because they can encourage minority students to higher aspirations and at the same time work to dispel myths and stereotypes about their race." *Oliver v. Kalamazoo Board of Education*, 498 F.Supp. 732, 748 (W.D. Mich. 1980), *appeal pending*. We thus conclude that the orders here are remedial: they are designed to make the children whole, to vindicate their rights, and that is indeed their effect. Indeed, under the principle of the law of the case, such a conclusion is compelled by our past decisions in this case.

[3] Appellants argue further that even if these orders are remedial, they constitute forbidden racial preferences. Once again, we have already rejected a similar argument with respect to the one-for-one hiring ratio, *Morgan v. Kerrigan*, 530 F.2d at 432 n.2, and we do so now with respect to the instant orders. Once there has been a finding of intentional racial discrimination, race-conscious remedies are a constitutionally valid means of ameliorating the effects of such discrimination. *See, e.g., Fullilove v. Klutznick*, 448 U.S. 448, 477-78, 100 S.Ct. 2758, 2774, 65 L.Ed.2d 902 (1980) (Burger, C. J., announcing the judgment of the Court); *id*, at 517-19, 100 S.Ct. at 2794-2796 (Marshall, J., concurring in the judgment); *Regents of the University of California v. Bakke*, 438 U.S. 265, 305, 98 S.Ct. 2733, 2756, 57 L.Ed.2d 750 (1978) (Powell, J., announcing the judgment of the Court); *Id.*, at 362-79, 98 S.Ct. at 2784-2793 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part). Indeed, once a court has found racial discrimination in a school case,

race-conscious remedies not only are permitted, they are said to be required where colorblind approaches would be inadequate. *See, e.g., Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. at 28, 91 S.Ct. at 1282; *Green v. County School Board*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).

There are, of course, limits to the use of race-conscious remedies, whether they be statutory or court-ordered. We have stated that

> racial criteria should be strictly scrutinized and given legal sanction only where a compelling need for remedial action can be shown. . . . [T]he means chosen to implement the compelling interest should be reasonably related to the desired end.

Associated General Contractors of Massachusetts, Inc. v. Altshuler, 490 F.2d 9, 17-18 (1st Cir. 1973), *cert. denied*, 416 U.S. 957, 94 S.Ct. 1971, 40 L.Ed.2d 307 (1974). The constitutional violations found in this case certainly, under the precedents cited *supra*, constitute the "compelling need" for a race-conscious remedy. Once this has been established, the proper test is essentially one of reasonableness. Other circuits are substantially in accord, stating, for example, that affirmative action plans may not "unnecessarily" "trammel" the interests or opportunities of whites. *See Valentine v. Smith*, 654 F.2d 503, 510 (8th Cir.), *cert. denied*, — U.S.—, 102 S.Ct. 972, 70 L.Ed.2d — (1981); *Detroit Police Officers Association v. Young*, 608 F.2d 671, 696 (6th Cir.), *cert. denied*, — U.S. –, *101 S.Ct. 3079, 69 L.Ed.2d 951 (1980); United States v.*

City of Miami, 614 F.2d 1322, 1339, *reh. en banc granted*, 625 F.2d 1310 (5th Cir. 1980); *see also United Steelworkers of America v. Weber*, 443 U.S. 193, 208, 99 S.Ct. 2721, 2729, 61 L.Ed.2d 480 (1979)

The orders here meet this test of reasonableness. They were necessary to safeguard the progress toward desegregation painstakingly achieved over the last seven years. Without them, the percentage of blacks would have fallen almost to its level nearly a decade ago, before this suit was brought. Such a result could not be countenanced. *See generally Green v. County School Board*, 391 U.S. at 438-39, 88 S.Ct. at 1694; *Morgan v. McDonough*, 540 F.2d 527, 533 (1st Cir. 1976), *cert. denied*, 429 U.S. 1042, 97 S.Ct. 743, 50 L.Ed.2d 755 (1977). Nor was the position taken by the district court an extreme one: CBEB, for example, argues that it should have gone much further. The court postponed achievement of the 25 percent goal, rather than ordering a layoff procedure to meet that goal. It chose to forego using the layoffs as a means of achieving greater desegregation, in favor of simply ensuring that they did not threaten the progress already made.[6]

We thus conclude that the district court's orders were a reasonable response to the situation which confronted it, and that, in the circumstances, they do not constitute forbidden racial preferences. In what is to our knowledge

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[6] This discussion also serves to dispose of the issues raised by CBEB's appeals. CBEB essentially contends that the layoffs should not slow progress toward the 25 percent goal. We cannot say that the district court abused its discretion in entering the orders it did. The 25 percent goal, while real, *see* note 5, *supra*, was not to be achieved by hiring preferences, but simply by affirmative recruitment. The proposed layoffs presented the court with difficult decisions involving competing interests. As discussed above, we think the orders entered were reasonable.

the only other case dealing with this precise issue, a district court came to the same conclusion: a preference for black teachers in layoffs and recalls is a reasonable and constitutionally permissible solution to the problem. *See Oliver v Kalamazoo Board of Education*, 498 F.Supp. 732, 750-55 (W.D. Mich. 1980), *appeal pending*. We are not unmindful of the substantial human costs engendered by these layoffs, but those costs are, for the most part, the product of the layoffs themselves, and not of the court orders, which in themselves required no layoffs at all. We understand, and sincerely regret, the fact that the expectations of certain teachers have been defeated,[7] but the alternative would be to defeat the expectations of the plaintiff class of school children and their parents. The district court struck a reasonable balance between these competing interests, and we therefore see no reason to disturb it.

We turn, then, to the last prong of the *Milliken* test:

> [T]he federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution. . . . If, however, "school authorities fail in their affirmative obligations . . . judicial authority may be invoked."

Milliken v. Bradley, 433 U.S. at 280-81, 97 S.Ct. at 2757 (citation omitted). This factor cuts in favor of the district court's decision with respect to the teachers, since the

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[7] We do not accept appellants' argument that the collective bargaining seniority provisions preclude the court from taking the action it did. In the first place, the contract with the teachers provides that the layoff and recall procedure shall be subject to all lawful federal orders. Second, the contracts alone cannot bar a federal court from granting effective relief for constitutional violations. *See Arthur v. Nyquist*, 520 F.Supp. at 965, and cases cited therein.

district court accepted (with only minor modifications) the Boston School Committee's own proposal for dealing with the situation. This is not a case where a judicial formulation has been imposed upon a resistant and objecting local administrative body. The factor initially weighs against the order in the administrator's case, because the court refused to grant the School Committee's motion to conduct layoffs by seniority. For several reasons, however, this alone does not mandate reversal. First, the order is not particularly intrusive into local affairs; it simply mandates continued compliance with earlier orders, without becoming involved in such local matters as control of the budget, *see infra* p. 30. Second, the School Committee itself has taken no position in this appeal, so it is difficult to accept an argument premised on that body's interest in managing its own affairs. Indeed, the other local authority involved, the State Board of Education, has filed a brief in support of the order. Finally, as *Milliken* itself recognizes, even the interest of local authorities could not preclude a court from remedying constitutional violations. More intrusive measures have been authorized, where necessary, in other aspects of this case. *See Morgan v. McDonough*, 540 F.2d 527 (1st Cir. 1976), *cert. denied*, 429 U.S. 1042, 97 S.Ct. 743, 50 L.Ed.2d 755 (1977) (South Boston High School receivership).

[4] Appellant BTU raises one final argument, that the district court erred in failing to hold an evidentiary hearing before granting the School Committee's motion. We note at the outset that BTU never requested such a hearing until its motion for reconsideration, which by itself provides a strong reason for rejecting the argument, *see supra* pp. 25-26. In addition, the evidence that BTU wishes to present is, for the most part, either sufficiently

known to the district court or irrelevant. The district court was apprised of the fundamental information it required for a decision: the impact that layoffs would have on compliance with court-ordered remedies. The court was certainly aware of the impact that layoffs would have on those laid off. The layoffs themselves were never ordered by the court, whose orders were conditional, *see supra* pp. 24-25. Nor was the court obliged to consider budget reallocation as an alternative to the layoffs, since the School Committee's own motion kept it in substantial compliance with the court orders. Absent noncompliance, the court would have no justification to intrude upon local matters such as budget decisions. *Compare Oliver v. Kalamazoo Board of Education*, 498 F.Supp. at 746-50. We thus see no reversible error in the district court's denial of BTU's request for an evidentiary hearing in its motion for reconsideration.

Affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

TALLULAH MORGAN, et al.,

Plaintiffs,

vs.

No. 72-911-G

JOHN D. O'BRYANT, et al.,

Defendants.

JUL 30 1981

DOCKETED

MOTION FOR RECONSIDERATION, EVIDENTIARY HEARING AND STAY

MEMORANDUM OF LAW

DOCKETED

7/24/81
Upon consideration of these motions and supporting affidavits and memorandum, the motions are hereby denied without hearing oral argument or receiving written responses from the principal parties (who under Local Rules are entitled to respond on or before August 3, 1981, when the time within which intervenor BTU must appeal expires), the facts asserted in support of the motion were all known or assumed in a general way and considered by the Court at the time of its allowance, with modifications, of the school defendants' motion on 6/3/81. Chin. BR3186

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ORDER

(United States District Court
District of Massachusetts)

(Tallulah Morgan, et al., Plaintiffs, vs. John D. O'Bryant, et al., Defendants, No. 72-911-G)

The following is the typed text of Judge Garrity's July 24, 1981 Order denying BTU's Motion for Reconsideration, Evidentiary Hearing and Stay. The original handwritten Order appears on page A-17a.

> "Upon consideration of these motions and supporting affidavits and memorandum, the motions are hereby denied without hearing oral argument or receiving written responses from the principal parties (who under Local Rules are entitled to respond on or before August 3, 1981, when the time within which intervenor BTU must appeal expires). The fact asserted in support of the motions were all known or assumed in a general way and considered by the Court at the time of its allowance, with modifications, of the school defendants' motion on 6/2/81."

CONDITIONAL ORDER MODIFYING FACULTY DESEGREGATION ORDERS

June 2, 1981

(United States District Court
District of Massachusetts)

(Tallulah Morgan, et al., Plaintiffs, v. John J. McDonough, et al., Defendants, Civil Action No. 72-911-G)

Garrity, J.

After considering the written comments filed by the parties, and after hearing oral argument, the school defendants' motion for modification of faculty desegregation orders, filed May 15, 1981, is granted, and the court adopts the draft order submitted in conjunction with that motion, with the modifications outlined and explained at the hearing held on May 28, 1981, and incorporated herein. The statement of reasons dictated at the May 28 hearing constitutes the court's memorandum of decision on this matter.

The school defendants remain under a court-ordered obligation during the 1981-82 school year to increase the percentage of black teachers until the percentage of black teachers is not less than 20%. This obligation exists whether the teaching force is expanding or contracting and the relevant collective bargaining agreements are expressly subject to this and other court-ordered obligations. Notwithstanding the orders imposing such an obligation, which remains in effect, if layoffs are necessitated by the current fiscal crisis, the school defendants shall be deemed to be in compliance for the 1981-82 school year with the outstanding orders if they implement any such layoffs in accordance with the following procedure:

1. The layoffs will be performed in such a way that the systemwide percentage of black teachers will remain at the current level of 19.09%, and the systemwide percentage of other minority teachers will remain at its current level.

2. Blacks will receive an absolute preference for recall until a 20% figure is reached systemwide, which the court expects will be by March 1982.

3. Once this 20% figure is reached, no fewer than 20% of the teachers subsequently recalled or recruited will be black.

The obligation to engage in affirmative recruitment of black teachers until the relevant percentage equals 25% is suspended until all tenured teachers who will have been laid off have been recalled, provided that a pool of black applicants is maintained, by recruiting if need be, which is sufficiently large to assure the maintenance of the 20% figure.

This order is expressly conditional on predicted, major layoffs actually being made and is without prejudice to the plaintiffs' substitute motion for modification of faculty desegregation orders, filed May 26, 1981, and any parallel motions to be filed by plaintiff-intervenors El Comite and the Concerned Black Educators of Boston.

The obligations imposed by this and prior orders shall supersede Mass. G. L. c. 71, § 41.

/s/ W. Arthur Garrity, Jr.
United States District Judge

TRANSCRIPT OF PROCEEDINGS

(United States District Court
District of Massachusetts)

(Tallulah Morgan, et al., Plaintiffs, v. John O'Bryant, et al., Defendants, Civil Action No. 72-911-G)

Before: Hon. W. Arthur Garrity, Jr.,
District Judge

Court Room No. 5
Federal Building
Boston, Massachusetts
May 28, 1981

Appearances:

Larry J. Johnson, Esq., for the plaintiffs.

Doyle, Playter, Novick & Berkin, Esqs., by Atty. Caroline B. Playter, for El Comite de Padres.

Goodwin, Proctor & Hoar, Esqs., by Henry C. Dinger, Esq., for the defendant School Committee.

Robert H. Bohn, Esq., Assistant Attorney General, and Robert H. Blumenthal, Esq., Counsel, Board of Education, for the state defendants.

Atty. Marcia Seeler and Steven P. Perlmutter, Esq., Assistant Corporation Counsel, for the non-School Committee city defendants.

Grady and McDonald, Esqs., by James T. Grady, Esq., for the Boston Teachers Union.

Segal, Roitman & Coleman, Esqs., by Richard W. Coleman, Esq., for the Boston Association of School Administrators and Supervisors.

Choate, Hall & Stewart, Esqs., by W. Shaw McDermott, Esq., for the Boston Home and School Association.

Henry F. Owens, III, Esq., David Casey, Esq., and Atty. Nancy Gertner, for the Concerned Black Educators of Boston.

TRANSCRIPT OF PROCEEDINGS
(pages 65-75)

* * *(65) Now, I am going to decide this motion with respect to the modification of faculty desegregation orders now, and state at least some of the reasons, because you can see what happens when I say I will take something under advisement.

With respect, for example, to the school closings, that was three years ago, and I still haven't gotten out the detailed findings with respect to it, just the central findings.

Here, it will be a little different. I will rule on it, and basically it is to grant the motion with certain qualifications, which I will explain, but the form of order (66) will be issued subsequent to today, and I hope I am not jinxing myself by saying I think it will be tomorrow. It is just a question of minor language, not great findings, but I will state now the way the order will read, and then the reasons.

The changes in the order look to me to be five. It is adopted generally for reasons that I will explain, but now the modifications are that I will call it conditional and make it clear that the Court is not in any way trying to pre-empt issues that the Teachers Union and others are litigating in the state courts in entering this order. It is if dismissal can be made applicable only in that event, and that is implicit in the motion and the draft order, but it should be explicit.

Secondly, there is nothing controversial about this second one either. The language will be changed to make it clear that the order supersedes only Section 41 of Chapter 71, and not any other section, such as Section 38(g), that has to do with certification.

Next, it will include a provision in the order that the present level of other minority faculty and staff be maintained, and only that. It will not go beyond that, at this time, at least.

Next, it will enlarge upon the language in the second paragraph, Paragraph Number 3, along the lines of Mr. Blumenthal's talking about a gap that should be closed, (67) and here is the best language I can give you at the moment, but it will be refined when the order comes out.

It would add on to the sentence that the obligation to engage in affirmative recruitment of black teachers until the relevant percentage equals 25 percent is suspended until all tenured teachers who will have been laid off have been recalled, and to add the language, provided that a pool of black applicants is maintained, by recruiting, if need be, which is sufficiently large to assure the maintenance of the 20 percent figure which the Court expects will be attained by March of next year.

The order lastly will also make some reference to its being without prejudice to the proposals of the plaintiffs and the Black Educators and the other minority, El Comite, parties intervenors, to seek changes in the basic order to which this relates, that is to say, to make the percentage of OMs fixed to make the percentage of black faculty 22.4 instead of 20 and 25 percent, as Mr. Owens argues. This order is not intended to rule on that series of proposals.

Now turning to the reasons for the order. The first reason is that it does not in any way disable the School Department from complying with the outstanding order of getting 20 percent black faculty by March of 1982. It is in March of each year that the percentage is computed to see whether the court orders that there should be

one-half percent increase in (68) the number of black faculty each year, starting in 1978, until 20 percent is achieved.

I think it is almost certain, although it cannot be guaranteed, that there will be 20 percent black faculty and staff in the schools in March of next year.

Mr. Dinger said it in a sort of offhand fashion in his closing remarks. I think that if this plan is followed, the court order will be, if this plan goes into effect and if Mr. Grady loses in the state court, and so forth, that there will not be a violation of the orders of the Court as they stand today, that is, as of May 28, 1981. The order is that 20 percent be achieved, and I think it will be. We know that it will be no less than the 19.1 percent.

That is the first major reason. The second is one that has been recognized in the cases and received only sort of passing recognition today, or yesterday, in the arguments, and that is the legitimate job expectations of which teachers who have devoted the last five, ten, or fifteen years to serving the School Department.

I hardly heard a reference in all of the arguments that were made, although I know that people have had that in mind, how much has anybody talked about the white teacher who has been throwing himself or herself into his or her work for the schools of the City of Boston for the last decade, and is going to be bounced by this enormous layoff that is the (69) hypothesis that underlies the motion here?

There is a lot of talk about the excess teachers. There is a lot of talk about the teachers in general. But what about the individual teachers? Doesn't anybody think of the legitimate job expectations of a teacher who has been working, let's assume, just as wholeheartedly for the education, and the desegregated education, of the children in the city, and is that teacher to be given no consideration?

The law, in my understanding, is otherwise. Cases, and I will cite a couple of them, have ruled that the job expectations of tenured white teachers, and nontenured as well, but especially the tenured white teachers, should be accorded weight in hearings such as this. The cases that I have reference to have been cited, Oliver and Brown. Oliver against Kalamazoo Board of Education, Western District, 1980, 498 F. Supp. 732. The Angus Brown case is Carl Neave et al., Sixth Circuit, March 31, 1981, Cases Number 80-3468 and 3476.

So that is the second principal ground of the Court's basic order here.

Thirdly, and this is now a page from the School Department's booklet that they have been filing and refiling on these matters for the last several years, the Court's orders contemplated faculty and staff desegregation in the course of hiring. One of the means, the means of achieving the 20 percent black faculty and staff figure of a reduction (70) in force, or a RIF, as it is called, simply was not contemplated at the time of these original orders.

It was, I will state, for completeness and for candor, contemplated at the time of the 1.5 percent annual increment of black faculty. It was then realized by me that there would, in all likelihood, have to be reductions in force, or certainly very few new hires, and the 1.5 percent annual increment was ordered, having in mind the possibility of a reduction in force, but nothing like what is now in prospect.

So the Court is not prepared to order, as a means of achieving this 20 percent goal, a reduction in force type plan different from the one proposed by the school defendants. The school defendants have demonstrated their good faith in seeking to comply with these orders, and not just because they are orders, but with the

affirmative action programs, meaning black and other minority hiring and maintaining, by taking a stance not simply at odds with the Boston Teachers Union and BASAS, but also recognizing that this is going to cause genuine hardship to white teachers who have double or triple the tenure that the average black teacher has.

For the Court to use a RIF, that is, use a reduction in force, beyond the plan which has been adopted and filed by the School Department would, it seemed to me, inevitably engender bitterness, I would hope temporary, but it would set groups of white teachers against groups of black teachers, it seems to me, (71) and would cause discord and racial tension in the faculty and staff of the schools rather than at the teacher and parent level.

These are important, delicate considerations, and there is an effort always by all of us — and I will include myself explicitly — to achieve these goals without unnecessary creation of discord or tension, especially along racial lines.

I stated, and will restate, that what we are talking about at this hearing, it strikes me, is really more — yes, more instead of as much as — more a matter of principle than a practicality. That is to say, the 20 percent goal I think is going to be achieved in the spring of next year, whatever position is adopted here, whether it is to insist upon the language and compliance with the orders as they now stand or the relatively minor modifications that must be made to comply with the school defendants' proposal as modified in minor respects by the Court.

Lastly, in my view, the percentage of black faculty and staff which is required for student desegregation purposes today is, if anything, less than what was needed when I first entered these orders in 1975.

That is an odd one, isn't it? How could I feel that, with the black student population of the schools increasing from roughly 35 or 6 percent when these orders were first

entered up to 46 percent now, how could I feel that fewer (72) rather than more black teachers and staff should be required?

This has to do with the nature of the case and the purpose for which those orders were originally entered. They were entered first for the reason of role models. The difference between 19 and 20 percent, as far as the number of role models are concerned, is de minimis minimis, if that means extremely de minimis. There is no practical difference with respect to the number of role models.

But the other reason underlying the establishment of the 20 percent figure was to counteract, by increasing the number of black faculty and staff, the isolation that was experienced by many black students and their parents in the public schools back when these orders were first entered in 1975.

If anything, that reason underlying the order for increased black faculty and staff is less urgent now than it was then. You don't have the isolation and discrimination against black students and parents in the Boston public schools that you had six or seven years ago. Sheer numbers, the numbers of black students, and the activities of the parent organizations and of the community organizations, and in other respects, the extent — without going into all of the history of the last several years — the extent of discrimination against black students and parents today in the Boston public schools is, in my estimation or opinion and belief, very much less than what it was before the Court entered these (73) orders.

So that the bottom line on that last reason is the line that I have repeated fifty times over the last several years in this case, and that is, it is the students and the parents who are of necessary and principal concern to

the Court in a student desegregation case. This is a student desegregation plan.

It is true that increased black faculty and staff have a role, but it is a secondary role, it is a derivative role, and, if anything, the need for increased black faculty and staff in my opinion is less today than what it was then.

That doesn't mean that the Court has abandoned for a moment the 20 percent goal, or the 25 percent goal either. Those are dual goals, but I think it is very important here to consider all of the parties in interest, and the interests of the children and the parents are primary. Those of teachers are subsidiary; they are secondary.

Now, it would be possible, I am sure, to mention other subsidiary or ancillary reasons, but those are the principal reasons, the four that I have given, and that constitutes the Court's memorandum of reasons. I will get out, however, the order with the modifications that I have stated.

Now let me say that we have got a hearing here a week from today at 3:30, principally on South Boston High School. Get your motions in, if you wish to file motions about the (74) 22.4, the 25 percent, et cetera, and I won't hear them next week unless this criminal case I have folds, which I mentioned to you yesterday. There are nine defendants and witnesses from all over the country, and they tell me it is going to last four or five weeks.

If by any chance that case will end, I will have a hearing promptly on these motions that you are talking about, but we will just have to wait and see. We will not hear these motions next Thursday. I am talking about the motions to increase to 22 or 25 percent, or the other minorities motions, but it will be principally on the South Boston situation. I will set a date, though, at that time, if you get the motions in, when we will hear those

motions, as to which this ruling is without prejudice.

Now Mr. Dinger rises to ask for some clarification, I can tell without his even saying it, because that is the type of motion that they filed, a motion for clarification.

Mr. Dinger: Not with respect to the five changes — well, with respect to one of the changes that the Court made, and that is the portion that granted the motion subject to the motions that plaintiffs and El Comite and the Concerned Black Educators may file.

The Court: Not subject to. Without prejudice. There is a difference.

Mr. Dinger: All right. Then I will rest at that.

(75) The Court: Yes, Mrs. Playter.

Mrs. Playter: Your Honor, I note the Court indicated that it would include a provision to maintain the present level of other minority teachers but no provision in terms of recruitment for future maintenance, so that we could get — I am just not clear. Again, this is for clarification. Next year —

The Court: Well, I wanted to say, but I didn't, and I am not sure it will go in, because I don't want to handicap El Comite, this maintenance order I am clear should be included. I always look, and I don't know — Let me start again. I am just not that familiar with the Lau versus Nichols agreement to know whether I can fairly relate El Comite to the Lau agreement remedies that it has in these respects. I know that this was an agreement that was bargained for between you and your clients and the School Committee. I like, to the extent fair, to, if you will, pass over to the Lau agreement, to the extent that it can fairly be done, questions having to do with other minority interests here. That is the reason I didn't say anything explicitly. I am sure you are entitled to maintenance, in my view, and there will be an order to that effect entered. I am just not sure about the other dimensions of it.

* * *

JUDGMENT

(United States Court of Appeals
For the First Circuit)

Entered: Feb. 17, 1982

(No. 81-1561: Tallulah Morgan, et al., Plaintiffs-Appellees, v. John O'Bryant, et al., Defendants-Appellees, Local 66, Boston Teachers Union, AFT, AFL-CIO, Intervenor-Appellant.)

(No. 81-1617: Tallulah Morgan, et al., Plaintiffs-Appellees, v. John D. O'Bryant, et al., Defendants-Appellees, Boston Association of School Administrators and Supervisors, Plaintiff-Appellant.)

(No. 81-1618: Tallulah Morgan, et al., Plaintiffs-Appellees, v. John D. O'Bryant, et al., Defendants-Appellees, Concerned Black Educators of Boston, Plaintiff-Intervenor, Appellant.)

(No. 81-1619: Tallulah Morgan, et al., Plaintiffs-Appellees, v. John D. O'Bryant, et al., Defendants-Appellees, Concerned Black Educators of Boston, Plaintiff-Intervenor, Appellant.)

(No. 81-1646: Tallulah Morgan, et al., Plaintiffs-Appellees, v. John D. O'Bryant, et al., Defendants-Appellees, Concerned Black Educators of Boston, Plaintiff-Intervenor, Appellant.)

These causes came on to be heard on appeals from the United States District Court for the District of Massachusetts, and were argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged, and decreed as follows: The order of the District Court of June 2, 1981, and the order of July 24, 1981 denying reconsideration of that order are affirmed;

The order of the District Court of July 9, 1981, is affirmed; and

The order denying Concerned Black Educators of Boston's motion to rescind the June 2, 1981 order is affirmed.

No costs on appeal.

By the Court:

Dana H. Gallup
Clerk

[cc: Messrs. Miller, Kelly, Johnson, Simonds, Blumenthal, Somers, Mss. Playter and Gertner]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

(Supreme Court of the United States)

(Local 66, Boston Teachers Union, AFT, AFL-CIO, Petitioner v. Boston School Committee, et al., No. A-900)

UPON CONSIDERATION of the application of counsel for petitioner.

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 17, 1982.

/s/ William J. Brennan
Associate Justice of the Supreme
Court of the United States

Dated this 23rd day of April, 1982

COLLECTIVE BARGAINING AGREEMENT

BETWEEN THE
BOSTON TEACHERS UNION

LOCAL 66

AFT

AFL-CIO
AND THE
SCHOOL COMMITTEE
OF THE CITY OF BOSTON

ARTICLE IV

WORKING CONDITIONS

A. GENERAL

• • •

5. Seniority Defined

Seniority in the teachers' unit is defined as total years of professional service in the Boston school system for which salary credit is given for step advancement, including years on maximum whether

or not such teaching experience (120 days) results in a provisional contract in any year.

Time spent in authorized leave of absence granted for any reasons prior to September 1, 1980 will continue to count as seniority in the teachers unit. Paid leave of absence granted on or after September 1, 1980, including leave covered by workmen's compensation, will continue to count as seniority in the teachers' unit. Unpaid leave of absence granted on or after September 1, 1980 for any reason other than for union business under IVA, 8(a) will not count as seniority in the teachers' unit. The Union will indemnify the Committee against any cost or damages arising out of any dispute or proceeding connected with the prior sentence.

This provision shall become effective upon mutual approval of the revised seniority list or on January 1, 1979, whichever occurs sooner. Until seniority as redefined hereunder becomes effective, the current definition of seniority shall remain in force.

The Union shall be supplied with a current seniority list of all members of the bargaining unit.

* * *

C. OTHER WORKING CONDITIONS

* * *

16. Job Security

Effective September 1, 1980 through June 30, 1982, any teacher or nurse with tenure or permanently

appointed shall continue to be employed. This provision expires June 30, 1982.

17. Layoff and Recall Procedure

(a) This layoff and recall procedure will not apply to nontenured teachers but will apply to teachers with tenure and to nurses or other persons permanently appointed.

For the purpose of this section, all nurses with more than 3 consecutive years of service are deemed to be "permanently appointed" and nursing service will be considered a separate certification area.

(b) An employee will be given written notice of layoff by April 15 of the professional work year preceding the professional work year in which the layoff is to take place. For example, an employee to be laid off effective September, 1982 must be given written notice on or before April 15, 1982.

(c) Employees will be laid off in reverse order of seniority as defined in Article IVA 5, except that for the purpose of layoff seniority will be by certification area and an employee will be deemed to hold seniority rights in all areas in which he holds state certification. Seniority lists of laid off teachers by certification shall be made available to all of said teachers. The more senior teachers within a certification area with notice of layoff may exercise their seniority rights in the following order:

(1) by displacing the most junior teacher in all of the state certification areas in which he

taught satisfactorily for at least three (3) of the ten (10) years immediately preceding the effective date of the layoff;

(2) by displacing the most junior teacher in all of the other areas in which he holds state certification.

(d) A person promoted out of their bargaining unit on or after 9/1/80 will retain full seniority rights in all areas in which he holds state certification but shall not accrue seniority while outside of the bargaining unit. For purposes of this section a teacher "on assignment" outside of the bargaining unit for more than sixty (60) days is not considered to have been "promoted" and may continue to accrue seniority within this bargaining unit. Any person promoted out of this bargaining unit prior to 9/1/80 may continue to accrue seniority within this bargaining unit. For the purpose of this section, an employee with notice of layoff may exercise his seniority rights in the order specified in subsection (c).

(e) In any school year following the year in which any tenured teachers in Grades K-5 have received notice of layoff, the class size maximum for Grades K-5 shall not exceed 33. In any school year following the year in which any tenured teachers in Grades 6-12 have received notice of layoff, the class size maximum for Grades 6-12 shall not exceed 36. The provisions of this Section supersede any conflicting provisions of Article IV A I.

(f) **Recall**

(1) Persons on recall will be given first preference in filling permanent vacancies within the bargaining unit. Teachers will be recalled by seniority within their state certification areas on file. Seniority shall not accrue to an employee while on recall.

(2) Teachers on recall who are hired as *per diem* substitutes shall be paid at the *per diem* substitute rate and shall remain on recall.

(3) Recall rights shall be retained for two (2) years from the effective date of layoff unless sooner terminated by rejection of two (2) full-year recall offers or failure to report for work within fifteen (15) calendar days after receipt of such recall notice.

(g) **Resolution of Disputes**

Same as IIIC 20 of predecessor contract, except delete "excessing policy" or "excessing procedure" and substitute "layoff and recall procedure."

(h) A joint committee of the parties will plan for the establishment of a career transition plan to retrain teachers for positions within the school system and for linkages with the private sector to enable teachers to explore retraining opportunities for new careers. The target date for the establishment of this program is September 1, 1981.

(i) This layoff and recall procedure is subject to all applicable State and Federal laws and lawful Orders pursuant thereto.